ROTAN TITO AND OTHERS v. SIR ALEXANDER WADDELL AND OTHERS (RE-PLANTING ACTION): SUMMARY OF PROCEEDINGS FRIDAY, 31 OCTOBER 1975.

1. The entire day was taken up with the citing of legal authorities by Mr Macdonald (Counsel for the Banabans) to show that although the Resident Commissioner no longer existed and could not therefore prescribe the types of trees to be re-planted in the mined out areas, the Court had the right to intervene and order that his functions be performed.

Summary of Proceedings, Monday, 3 November 1975.

2. Mr Macdonald concluded his references to legal authorities which had taken up the whole of Friday, and then turned to point 6 on his main list of topics, namely, when does the obligation to re-plant arise in respect of (a) the 1913 Agreement, and (b) the A and C deeds. He then made a number of submissions on the construction of the 1913 Agreement. He maintained that land is not "worked out" until either a) all the phosphate has been removed, or b) under no conceivable circumstances could the Company come back to re-work it. In either case the Company must also have ceased to use the land for access. Mr Macdonald then cited evidence to show that as late as 1969 the BPC determined that they still required 50% of the land in the Central and Eastern mining areas for access and mining. Furthermore, although the other 50% of the land was no longer required by the BPC the Banabans were not informed until 1971 when they heard via the Foreign and Commonwealth Office. Mr Macdonald argued that it was difficult for a layman to tell just from looking at the land whether or not it had been fully worked out and that in practice it was quite impossible for the Banabans to know when the BPC no longer required their land. There was, therefore, he said, no cause of action until 1969 at the very earliest and therefore the question of laches (i.e. unreasonable delay in pursuit of a legal remedy) did not arise. Mr Macdonald pointed out that the leases did not expire until 1999, that access roads were

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shifted about as and when required and that significant areas of the central mining area were classified as only part worked out. The Banabans could not, therefore, know that in 1969 50% of the land would no longer be required by the BPC unless the BPC informed them, yet it was left to the Banabans to take the initiative on the reversion of land.

3. At this stage a technical point was raised by Mr Justice Megarry who was not happy that certain of the submissions being put forward by Mr Macdonald were as pleaded. His Lordship said he would consider this matter and give a ruling on Tuesday morning. Mr Macdonald then considered the land to which the re-planting obligation applied on a plot by plot basis. He argued that in nearly all cases there was no specific determination by the BPC that they no longer required the land until 1969 and therefore the question of laches did not arise. At this point a discussion arose concerning the exact meaning of the term "delimited area" which appeared in the 1913 Agreement. It appeared that this phrase could be used to apply to either (a) the whole area covered by the 1913 Agreement from which the Company could select 250 acres to mine, or (b) the 250 acres actually selected. As Mr McCrindle had already made certain submissions on the proper consumption of the term "the delimited area" it was agreed that for the purposes of the discussion then in progress the total area would be called the "envelope" and the 250 acres selected would be referred to as "the 250 acre area". As a result of this discussion Mr Macdonald agreed that henceforth plot 143 and plot 294 would no longer be considered as they were outside the relevant area. Mr Macdonald was still dealing with topic no.6 when the Court rose.